

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES ALLS,

Petitioner,

v.

Case No. 2:15-cv-2323

WARDEN, BELMONT CORRECTIONAL
INSTITUTION

JUDGE MICHAEL H. WATSON
Magistrate Judge Kemp

Respondent.

JAMES ALLS,

Petitioner,

v.

Case No. 2:16-cv-1001

WARDEN, BELMONT CORRECTIONAL
INSTITUTION,

JUDGE MICHAEL H. WATSON
Magistrate Judge Kemp

Respondent.

REPORT AND RECOMMENDATION

In Case No. 2:15-cv-2323, Petitioner James Alls submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on June 3, 2015, and moved for leave to proceed *in forma pauperis*. Because his application indicated that he had sufficient funds in his account at the Belmont Correctional Institution, the Court recommended that his application for leave to proceed *in forma pauperis* be denied and that, if Petitioner

wished to proceed with this petition, he be directed to submit the appropriate filing fee (\$5.00).

Shortly after that recommendation was made, Petitioner withdrew his petition, and the case was closed. Docs. 4, 5. After he pursued additional relief in state court, Petitioner moved, on November 19, 2015, to reinstate the case. That motion was granted on September 12, 2016, conditioned on his paying the filing fee. He has never submitted that fee. Rather, on October 19, 2016, he filed a separate habeas corpus action, which is now Case No. 2:16-cv-1001, and moved for leave to proceed *in forma pauperis* in that case.

The petitions filed in the two separate cases are, for all material purposes, identical, and they challenge the same state court judgment. Consequently, these two cases are consolidated for all purposes under Fed.R.Civ.P. 42(a). That leaves the question of the fee.

The application filed in support of the more recent application (Case No. 2:16-cv-1001, Doc. 1) shows that Petitioner had, as of the date of that application, enough money in his institutional account to pay the \$5.00 fee. On the six-month account statement he submitted in support of the application, his balance is shown as being \$190.31 at the beginning of the period and \$181.72 at the end. He spent hundreds of dollars at the institution's commissary during that time period. He could easily afford to pay the filing fee in either case, but has not done so.

Based on the facts, it is **RECOMMENDED** that the Court deny the application

for leave to proceed *in forma pauperis* filed in Case No. 2:16-cv-1001. It is further recommended that if Petitioner fails to submit a \$5.00 filing fee for these consolidated cases within thirty days of any order adopting this Report and Recommendation, these cases be dismissed.

Procedure on Objections

If any party objects to this Report and Recommendation, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. §636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

/s/ Terence P. Kemp
United States Magistrate Judge